(3)

Supreme Court, U.S.
FILED
OCT 9 1998
OFFICE OF THE CLERK

No. 98-351

In The

Supreme Court of the United States

October Term, 1998

BURLE B. BEARD,

Petitioner,

v.

DAN BAUM, HAROLD CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, CAROLINE VENUSTI, and the STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

REPLY BRIEF OF PETITIONER

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25 pp

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STATEMENT OF THE CASE

Respondents' statement of facts argue part of the evidence submitted to the jury in a three week trial which found against them and was affirmed by *Beard II*. Respondents were allowed to put Beard's diary entries into evidence and argue the same lack of causation theories they argue here. The jury did not believe that version and the Alaska Supreme Court affirmed those findings, with minor exceptions noted in Beard's Certiorari Petition.

Respondents were also allowed to argue to the jury that Beard is unpopular or unlikable because he writes off-color jokes in his diaries. There was no evidence that Beard repeated any of these to anyone ever and, specifically, to anyone at work. The jury evidently did not think they were relevant. Respondents included these same diary entries in its brief to the Alaska Supreme Court in *Beard II*. The Alaska Supreme Court either ignored them or considered them irrelevant to the legal challenges to the jury verdict when it affirmed on the facts in *Beard II*. Beard is uncertain why Respondents include these in their appendix to this Court. Perhaps it is to make the point that it is only the unpopular or weak that need the First Amendment.

Respondents' App. 13 through 28 is the in-house investigation which Beard called a "whitewash" to his boss, and was threatened for doing so; he called it a whitewash at trial and the jury evidently agreed.[1] The Alaska Supreme Court found the jury entitled to believe that Respondents retaliated against Beard for calling this

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[1] *Beard II*, 864 P.2d 538, 543. Cert. Petition App. 86-87.

investigation a whitewash. *Id.* Beard does not believe further reference to it gives it any greater probative value or supports Respondents here.

Respondents' contention that Beard's criticisms, and his attempts to get his allegations of wrongdoing investigated were disruptive, was tried, failed, and the lack of evidence was affirmed in *Beard II*.[2]

Respondent McMullen's behind-the-scenes efforts to collect evidence of disruptive activity by Beard was also found to be outrageous conduct, so as to support the jury finding of intentional infliction of emotional distress against McMullen.[3]

Respondents assert that Beard has never by testimony or affidavit challenged Senkow's testimony. Respondents' Br. 12, n. 5. That is correct. Respondents know the reason: at the start of the evidentiary hearing on the futility of exhaustion issue, Beard's counsel explained why Beard was not in attendance and asked the State and these respondents to agree that Mr. Beard's testimony would not be needed. The State and Respondents here agreed. The exchange was:

THE COURT: Well, you want to call your first witness?

MR. WICKWIRE: First, Your Honor, may I . . .

THE COURT: Mr. Wickwire?

---

[2] *Id.* at 543, n.6. Cert. Petition App. 88.

[3] *Beard II*, 864 P.2d 538, 549. Cert. Petition App. 101-03.

MR. WICKWIRE: . . . address a procedure point? At the time this hearing was set, I assumed that I'd be able to get ahold of my client. I hadn't been able to. He's been traveling in a camper vehicle down south. He calls in about every week to ten day normally, but since this – at the time this hearing was set until now, he hasn't called in. So I have been unable to get him. Late last week I called Mr. Olsen and purpose of my discussion was that I didn't want to go over this hearing if there was going to be any new statement or any new incident that Mr. Beard was going to be placed in as having said or did. Mr. Olsen assured that no, there wasn't any new statement or any new incident where Mr. Beard's conduct was going to be – in evidence that was going to be something new today. And with that representation, I didn't ask that this be rescheduled.

But if we're going to rehash everything else that's been done in the evidence, in the depositions and the trial and the motion papers, and it is with that condition that I am willing to proceed here. I certainly don't want a decision to be made if there's anything new that is going to surprise me. That's what I tried to do last week.

MR. OLSEN: [State and Respondents' counsel]: Your Honor, and that's correct. We don't have any conversations that we're going to testify about that Mr. Beard hasn't had a chance to comment on.

THE COURT: Okay. Your first witness?

MR. OLSEN: Bruce Senkow, Your Honor.

App. 5-6.

Respondents state that on remand for the evidentiary hearing, "defendants obtained evidence from Senkow's deposition that the Senkow affidavit had been improperly used,. . . . " Respondents' Br. 9. The evidence on this was that, shortly after the briefing was completed in *Beard I*, so before the trial and evidentiary hearing on exhaustion, the State hired Senkow into Respondent Venusti's position at substantially higher pay, then deposed him.

The timing of the State's hiring Senkow, and his wife, was set out with transcript cites in Beard's *Brief of Appellee* in *Beard III*, which stated:

SENKOW'S INTERESTS

> By the time of Senkow's deposition and trial testimony, he had been hired into Venusti's former job at DOT. (Tr. 1542-43) Senkow had his eye on Venusti's job as DOT Personnel Officer "for a long time" (Tr. 1542), and worked as her subordinate for a year before she decided to retire (Tr. 1542), which happened in approximately November 1990 (three months before Senkow's February 1991 deposition). (Tr. 1542) Thus, the State hired Senkow in Fall 1989. The briefs in *Beard I* were filed in Summer 1989.
>
> DOT hired Senkow's wife, also during the pendency of this litigation, after he was hired by DOT. (Tr. 1790) Their DOT salaries are substantially all of their income. (Tr. 1789)
>
> Senkow said that before signing his affidavit, Identification Exhibit 67, he read it and believed it was accurate. (Tr. 1793)

App. 2-3, 6-9.

The trial court heard this evidence again, App. 6-9, before finding that Beard had established the futility of making additional requests to his then union representative, Senkow, to grieve the constructive discharge pattern. Cert. Petition App. 36-37. Thus, Beard did not "improperly" use Senkow's affidavit; he contended that his attempt to discredit his own affidavit was motivated by his new loyalty to the State and Respondents and his financial interest in his and his wife's DOT employment.

Respondents contend Beard abandoned the constitutional claims in his *Reply Brief of Appellant* in *Beard I*. Respondents' Br. 8, 17, 20. This is contrary to the *Beard I* opinion which discussed the elements and proof needed on Beard's § 1983 claims and remanded them for trial. The Superior Court instructed the jury on their elements and the jury returned verdicts on them, which were affirmed in *Beard II*.

Beard's statement in his *Beard I* reply brief conceded only that " . . . the state and its officials *acting in their official capacities* are immune from suit for 42 U.S.C. Section 1983 violations because they are not 'persons.' " [Emphasis added.]

The sentence in Beard's reply brief in *Beard I* was in response to and agreed with Respondents' statement of the holding in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), in its *Beard I* appellee brief, found in Respondents' App. 30-31.

Respondents fault Beard for not including the "no exhaustion required for § 1983 claims" as a point on

appeal in *Beard III*, in 1997.[4] Beard was appellee in *Beard III*, so, under Alaska's appellate rules, appellees do not select or state points on appeal. That is for the appellants. Alaska R. App. Proc. 204(e).

OMISSIONS FROM RESPONDENTS' APPENDIX

Respondents' App. 38 purports to set out verbatim the *Conclusion* portion of Beard's reply brief in *Beard I*. Two full pages of that brief have been omitted from this appendix, without an ellipsis or other indication of an omission. The entire conclusion is reproduced at App. 11-14.

Respondents' App. 42 has omitted the jury's handwritten note opposite question 7 of the jury verdict, which states: "No amount of money could fairly compensate Mr. Beard for loosing (sic) his freedom of speech."

Respectfully submitted,

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[4] The 1997 date is incorrect. It should state 1994.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

BURLE B. BEARD,)
Plaintiff,)
vs.)
DAN BAUM, et al.,)
Defendant.)

Case No. 4FA-87-369 Civil

VOLUME IX

TRANSCRIPT OF TRIAL BY JURY,
CONTINUED (EXCERPT)

Wednesday, July 24, 1991, 8:15 a.m.

ARGUMENT ON JURY INSTRUCTIONS

Wednesday, July 24, 1991, 2:54 p.m.

TRANSCRIPT OF TRIAL BY JURY,
CONTINUED (EXCERPT)

Thursday, July 25, 1991, 8:24 a.m.

VERDICT RETURN (EXCERPTS)

Monday, July 29, 1991, 12:29 p.m.

HEARING ON MOTIONS

Monday, November 25, 1991, 2:27 p.m.

Fairbanks, Alaska

Cross-Examination of Bruce Senkow by Mr. Wickwire

* * *

[p. 1542] this job for a long time.

Q All right. Well, that was three years before you actually left that job and became the Personnel officer of the DOT, right?

A Yes, it was.

(Tape changed)

4FAB-2071

Q And you'd met Caroline Venusti in your meetings and going through the evaluation – or investigation process, the appeal process, I'll call it, right?

A Yes, I did.

Q So you learned that she was going to retire and you applied for her job when it came open, right?

A No, I took a – actually a demotion and went to work for the State in the Division of Personnel, Department of Administration several years prior to Caroline Venusti's retirement or even hinting of retirement. I then took a lateral transfer and went into the Personnel office in DOT and worked there for, I don't know, a year or sometime before Caroline decided to retire. I don't think anybody had any idea that Caroline was definitely going to retire; but I mean, it was going to happen, and I was willing to put my place where I had the best chance for that job.

Q Does that job pay more than you were making as an APEA [p. 1543] rep?

A No, it doesn't.

Q All right.

A No.

Q And does it have better benefits or better advancement opportunities?

A No, it's less stressful.

Q Your boss is John Horn, right?

A Currently.

Q And is that position he is in the same position that William McMullen was in five years ago?

A No. Bill McMullen was the Director of Design and Construction. He wasn't Regional Director at the time.

Q All right. You said in answer to Mr. Olsen's questions that you didn't believe your testimony here could influence your position at DOT, right?

A I don't feel it will.

Q So do you believe the results of this case cannot restrict or cause or force the Department of Transportation to change their ways of doing things?

A That doesn't – I mean – the results of this case? I mean, I – Randy Olsen's question to me was will it affect my job, I believe, or something, and I don't think this case will have an affect [sic] on my job or my testimony.

* * *

App. 4

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,

Plaintiff,

vs.

DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI, individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA,

Defendants.

Cause No. 4FA-87-369 Civil

VOLUME XI

April 11, 1994 – Pages 1772 through 1895

TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE JAY HODGES
Superior Court Judge

Fairbanks, Alaska
April 11, 1994
9:00 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF: THOMAS R. WICKWIRE
Attorney at Law
3730 University Avenue South
Fairbanks, Alaska 99709

FOR THE DEFENDANTS: RANDY M. OLSEN
Office of the Attorney General
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701

* * *

[p. 1774] THE COURT: Well, you want to call your first witness?

MR. WICKWIRE: First, Your Honor, may I. . . .

THE COURT: Mr. Wickwire?

MR. WICKWIRE: . . . . address a procedure point? At the time this hearing was set, I assumed that I'd be able to get a hold of my client. I hadn't been able to. He's been traveling in a camper vehicle down south. He calls in about every week to ten day normally, but since this – at the time this hearing was set until now, he hasn't called in. So I have been unable to get him. Late last week I called Mr. Olsen and purpose of my [p. 1775] discussion was that I didn't want to go over this hearing if there was going to be any new statement or any new incident that Mr. Beard was going to be placed in as having said or did. Mr. Olsen assured that no, there wasn't any new statement or any new incident where Mr. Beard's conduct was going to be – in evidence that was going to be

something new today. And with that representation, I didn't ask that this be rescheduled.

But if we're going to rehash everything else that's been done in the evidence, in the depositions and the trial and the motion papers, and it is with that condition that I am willing to proceed here. I certainly don't want a decision to be made if there's anything new that is going to surprise me. That's what I tried to do last week.

MR. OLSEN: Your Honor, and that's correct. We don't have any conversations that we're going to testify about that Mr. Beard hasn't had a chance to comment on

THE COURT: Okay. Your first witness?

MR. OLSEN: Bruce Senkow, Your Honor.

* * *

[p. 1789] Q You said your DOT employment will not affect your testimony here today?

A No, I don't believe it will.

Q Okay. Did your wife also work for DOT?

A She does now. She was laid off and she got picked up by virtue of the lay-off rights.

Q But is all of your income, your family income from DOT employment?

A Currently.

Q So between you and your wife, that is substantial, without asking you to pin it down; right?

A I believe that's true. I don't think many people know my wife works at DOT though. She uses her own

maiden name, so I know there are a lot of people that even deal with me directly that don't know she works there.

Q Very well. But between you and your wife, all of your income. . . .

A Right.

Q . . . . comes from DOT, and it is substantial between the two of you.

A Yeah. I would say it's doing okay.

Q And as personnel officer at DOT, you're familiar with the personnel rules that apply to whether or not both husband [p. 1790] and wife can work at DOT?

A True.

Q Miss Venusti (ph) and her husband had also both worked for DOT; right?

A There are many couples that work at DOT.

MR. OLSEN: Your honor, I think we've got this point made that they're both employed. . . .

THE COURT: The objection is overruled.

Q (By Mr. Wickwire) Did you find out that it was possible for both you and your wife to work there by getting advice from Miss Venusti how she did it?

A No, no. I didn't talk to Miss Venusti about my wife's employment at all. My wife came substantially later after I was hired. In fact, she had to accept the job or lose her lay-off rights. She was laid off from corrections. She had no choice. In fact, she preferred not to work at DOT. So she had to take that or have no employment.

Q Considering your affidavit that you wrote, signed in November of '87 – correction, May of '87.

A Correct.

Q Mr. Beard left the employment in August of '86; right?

A I believe that was – Yeah.

Q And so by May of '87, litigation was already started by the State?

A I wasn't really aware of litigation starting at that point.

* * *

[p. 1793] A I said, Yes, I read it and signed it, believed it was fairly accurate.

Q So now you're saying that it's not accurate; right?

A I haven't said – as I said earlier in my testimony, I explained the issues in number 4 about what I felt was – those were from my perspective. If I had prepared that affidavit and knew what it was for, it wouldn't have come out reading like that. That was fairly wishy-washy. It doesn't say anything about, you know – again, I still think it's fairly accurate for what purpose it served, but it wouldn't have been something I would have written that way.

Q Well, but you read it and you signed it, knowing it's an affidavit which means it's under-oath testimony; right?

A Again, I'm not saying that it's false. I'm just saying it's fairly wishy-washy and, yes, I could sign it.

Maybe that's why the first one – and I don't have the first affidavit. But that was the one that I had objections to and refused to sign that one.

Q Well, I don't want to read paragraph 4 again. We've been over it and over it. But I'd ask the Court that the words speak for themselves and they have their regular English meaning. Mr. Senkow, have you reviewed your depositions recently?

A No, I haven't.

MR. WICKWIRE: Does the Court have those?

* * *

IN THE SUPREME COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,

Appellant,

V.

DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. MCMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA,

Appellees.

Supreme Court Case No. S-3229

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
JAY HODGES, JUDGE

REPLY BRIEF OF APPELLANT

LAW OFFICE OF THOMAS R. WICKWIRE
3700 University Avenue South
Fairbanks, Alaska 99709
474-0068
Attorney for Appellant

/s/ Thomas R. Wickwire
THOMAS R. WICKWIRE

FILED in the Supreme Court
of the State of Alaska
this 7th day of August, 1989.

CLERK OF THE COURT

By: /s/ Teresa High
DEPUTY CLERK

* * *

II. The Section 1983 Claims

Beard concedes the State and its officials acting in their official capacities are immune from suit for 42 U.S.C. Section 1983 violations because they are not "persons."

CONCLUSION

> But you have neglected the more important matters of the law – justice, mercy and faithfulness. . . . You strain out a gnat but swallow a camel. Matthew 23:23-24 (NIV)

Kenneth Culp Davis wrote *Discretionary Justice* in 1969 (University of Illinois Press 1971), with the theme that there is a need to replace broad discretion which the courts have in some areas with more rules so more cases are decided on their merits and with better consistency. He specifically criticized the procedural defenses available to the government when defending civil cases as not worth their cost in money and injustice caused when the merits of a case are never reached. Professor Davis wrote:

> The intricacies of the technical remedies have grown, the need for litigating them has increased correspondingly, and the intricacies

grow still further. Someone needs to find an escape from the vicious circle.

The needed escape, I think, has to be from the tendency of government lawyers, like any other lawyers, to use all available tricks to win for their client. That government lawyers use all legal and ethical means to win their cases is, of course, only natural. But I think they can and should rise to a slightly higher degree of sophistication. Uncle Sam is not an ordinary client. Uncle Same [sic] always wins when justice is done. This means he may lose when judgment is entered for him, and he may win when judgment is entered against him. That this is so is not merely an idealist's dream but a hard-headed reality. It has *sometimes* been the basis on which government lawyers have exercised their important discretionary power.

For instance, in *Ceballos v. Shaughnessy*, government lawyers made a concession on a point which they had won in both lower courts. Without the concession, they might have won a judgment in the Supreme Court, as they had in both lower courts. Because they made the concession, the Supreme Court entered judgment against them. They thought justice was thus done, and I agree.

Should not the spirit behind this concession more frequently actuate government lawyers?

What I am suggesting is that the role of government lawyers in defendant suits against the government does and should involve a semi-judicial function. Even when they can win by interposing a technical defense. I think that sometimes they should help the court to reach the merits. When their conscientious appraisal

> of a case leads them to believe that the chances are substantial that a court may find that the aggrieved party has suffered injustice at the hands of a government officer. I think they should refrain from interposing a technical defense unless the policy reasons behind the defense are strong as applied to the case. [Discretionary Justice, A Preliminary Inquiry, U. of Illinois Press 1971 at 160)]

Since litigation lawyers get absorbed in obtaining a remedy or protecting their client from a risk, the adversary system encourages them to learn the "tricks" of the law and use them to win. But that explanation is not a justification. It will take conscious effort by government defense lawyers to look to the merits first, when there is no practical need to do so until the procedural defenses have failed.

The procedural defenses succeeded in barring Beard from ever getting the merits of his intentional infliction of emotional distress and constructive termination (successful harassment) claims before a fact finder or in getting any contract remedy.

There is evidence suggesting that McMullen, a D.O.T. division director, knew that a paper record of progressive discipline must be made. That if he could induce or, failing that, accuse Beard of disrupting the work of himself and others with this dispute, but never allow him an opportunity to disprove this, he could wrongfully fire Beard or force him to quit. How much protection from the law should the courts give to such government supervisors?

The law already recognizes the employee's property and liberty interests and the State's pay and promotion by merit, not by politics or favoritism, interests in public employment. The taxpayers and those affected by the efficiency and effectiveness of D.O.T. have an interest against funding the year or so long effort required to make a paper trail of progressive discipline. During this time the supervisor's interest is furthered if he can induce the target employee to make mistakes which can be used in poor evaluations. The law encourages clever manipulation of the system if it can close off an inquiry into the truth behind the accusations.

For these reasons, the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional infliction of emotional distress, wrongful constructive termination and defamation.

Respectfully submitted,

/s/ Thomas R. Wickwire
Thomas R. Wickwire
Attorney for Appellant

IN THE SUPREME COURT FOR THE
STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN,	)
Appellants and Cross-Appellees,	)
v.	)
BURLE B. BEARD,	)
Appellee and Cross-Appellant.	)

Superior Court Case No. 4FA-87-369 Civil
Supreme Court Case No. S-6378
Supreme Court Case No. S-6438

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

JAY HODGES, JUDGE

BRIEF OF APPELLEE

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Filed December 21, 1994 in
the Supreme Court for the
State of Alaska

Jan Hansen, Clerk of
the Appellate Courts

By: /s/ Teresa High
Deputy Clerk

* * *

lawsuit be about if not about his supervisors' plan to fire him or drive him to quit? If Senkow knew Beard planned a lawsuit if fired or forced to quit, then he knew Beard's resignation was not voluntary.

Senkow said, as best he could recall, Beard did not tell him the stress was causing him physical pain (Tr. 1784), but when Beard would get talking about his supervisors' overall actions, Senkow would narrow him down to the one issue that Beard wanted grieved, (Tr. 1783), essentially getting him off this topic and back to a specific grievable act.

SENKOW'S INTERESTS

By the time of Senkow's deposition and trial testimony, he had been hired into Venusti's former job at DOT. (Tr. 1542-43) Senkow had his eye on Venusti's job as DOT Personnel Officer "for a long time" (Tr. 1542), and worked as her subordinate for a year before she decided to retire (Tr. 1542), which happened in approximately November 1990 (three months before Senkow's February 1991 deposition). (Tr. 1542) Thus, the State hired Senkow

in Fall 1989. The briefs in *Beard I* were filed in Summer 1989.

DOT hired Senkow's wife, also during the pendency of this litigation, after he was hired by DOT. (Tr. 1790) Their DOT salaries are substantially all of their income. (Tr. 1789)

Senkow said that before signing his affidavit, Identification Exhibit 67, he read it and believed it was accurate. (Tr. 1793)

* * *
